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Supreme Court, U.S.
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No. 08-

IN THE
Supreme Court of the United States

ROGER C. WESLEY, Personal Representative
of the Estate of PATS SPLANE

Petitioner,

v.

SOCIETY NATIONAL BANK,
and its Successors in Interest, Key Trust Company of
Ohio, N.A., and KeyBank National Association,
Cleveland, Ohio, Charter No. 14761,

Respondents,

On Petition For A Writ of Certiorari
To The Supreme Court of Oregon

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QUESTION PRESENTED

This case raises important questions whether a national bank trustee who, along with its predecessors, has maintained continuous trustee control over an Ohio trust for more than 80 years is legally required to render an historical accounting of the trust to the trust's beneficiary and her personal representative to ascertain the whereabouts of identified missing trust funds. The case involves the state trial court's determination that the bank trustee had no duty to account to the beneficiary of the trust beyond 1992, despite the trust's being in continuous existence from 1919 to the time of trial.

As an outgrowth of the bank trustee's basic duty to provide an historical accounting, this case presents important state/federal law questions for national bank trustees who are subject to both state and federal accounting and record keeping requirements whether proof burdens lie with the trustee beneficiary (and not the trustee) to prove the trustee's malfeasance or accounting breach. In effect, this case marks the first time in which a court having considered the merits of a trust accounting claim, placed the burden of proof on a trust beneficiary to show that the identified missing funds that could not be accounted for by the bank trustee were misappropriated or misplaced.

In reviewing the merits of petitioner's petition, this Court should consider whether a state judgment that places the burden of proof on the estate beneficiary and her personal representative to

establish bank trustee malfeasance conflicts with federal regulatory requirements that require national banks to adequately document the establishment and termination of each fiduciary account and maintain adequate records for all fiduciary accounts. We believe these federal record retention requirements placed on national banks are implicitly imposed to enable them to responsibly and fully respond to beneficiary inquiries and provide historical accountings when requested, or otherwise warranted.

This question over the application of federal banking regulations to state accounting practices that fall well below state normative standards for holding bank trustees to historical accounting responsibilities is a case of first impression as well. Petitioner has preserved this federal question issue both in the trial court and in the appellate proceedings below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Roger C. Wesley, Personal Representative of the Estate of Pats Splane, respectfully petitions for a writ of certiorari to review the order denying review of the Supreme Court of Oregon on May 7, 2008.

OPINIONS BELOW

The Supreme Court of Oregon's order denying review is unreported and is reproduced in appendix A at App.1. The Oregon Court of Appeals Court of Appeals Affirming Without Opinion is unreported and is reproduced in appendix B at App.3. The Oregon Circuit Court' s general judgment and opinion are unreported and are reproduced in appendix C and D at App.5 and App.10.

JURISDICTION

The order denying review was issued by the Supreme Court of Oregon on May 7, 2008, appendix A at App.1. The Court of Appeals affirming of the lower court's judgment without opinion was issued on November 28, 2007, appendix, B at App.3. The Circuit Court's general judgment and opinion were issued on August 31, 2004 and July 21, 2004, respectfully, appendix C and D at App.5 and App.10. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTORY AND REGULATORY PROVISIONS

The following statutory and regulatory provisions are pertinent to this case:

Title 10 U.S.C. §92A prescribes federal trust authority over national banks and are reproduced in appendix E atApp.18. 32 C.F.R.§9.8 applies state law to national bank trust operations but requires member banks to retain their trust operation records for at least three years from "the later of termination of the account (trust) or the termination of any litigation relating to the account (trust)," and is reproduced in appendix F at 44.

STATEMENT OF THE CASE

This was an action by the personal representative of an estate (hereinafter "petitioner") against the trustees of a trust (hereinafter "respondents") of which the decedent was a beneficiary. The personal representative sought an accounting for the trust assets and in the alternative a money judgment for assets improperly diverted from the trust by the trustee.

The trial court entered a judgment denying the petitioner's request for an accounting, and the trial court denied in part and granted in part the petitioner's request for reimbursement by respondents to the estate for trust funds diverted for

respondent's attorney fees. The trial court also denied the petitioner's request for his attorney fees.

The Supreme Court of Oregon denied review of the Court's of Appeals' affirmance without opinion of the Circuit's Court's general judgment.

Lower court proceedings

This matter arose out of a dispute in equity between petitioner and respondents over whether respondents had the duty and burden to account for funds and assets taken into their fiducial custody, whether they could defray fees incurred by their attorneys in the lower court to resist petitioner by invading the trust principal administered by them in their trust capacity, whether any of petitioner's claims were barred by pertinent statutes of limitations or the doctrine of laches, and whether petitioner was entitled to discovery prior to 1953.

This matter was originally commenced in April 1993 when petitioner (the Personal Representative of the Estate of Pats Splane) filed a petition to have certain funds in the Mary Baldwin Trust (Baldwin Trust), which had been the subject of a power of appointment in Pats Splane, declared to be assets of this estate in Oregon. On July 26, 1993, the trial court ruled that the affected Baldwin Trust funds were assets of the Oregon estate of Pats Splane, holding that Pats Splane had validly exercised the power of appointment granted to her in the underlying Baldwin Trust. By exercising the power of appointment, she bequeathed her interest

beneficiaries of her estate, Kathleen Wesley and Suzanne Coe.

Respondents filed a general appearance in the matter and contested petitioner's petition. By so appearing, respondents asserted and defended the position of the default beneficiaries (the Bonsals) in opposition to petitioner's claim on behalf of Pats Splane's beneficiaries. A final judgment on this issue was entered December 6, 1993. At that time all affected assets of the Baldwin Trust became due and payable to the estate. On December 21, 1993, respondents appealed this judgment, contending that there had been no valid exercise of the power of appointment by Pats Splane and claiming entitlement of the default beneficiaries (the Bonsals) to the trust proceeds. Petitioner moved to dismiss respondents' appeal for lack of standing to contest the appeal (the Bonsals, who made no appearance, being the real parties in interest), and respondents appeal was dismissed by this court for lack of standing.

That appeal continued on the petitioner's cross appeal, and the court of appeals recognized that respondents were neutral stakeholders in the matter as a matter of law, serving in the capacity of trustees, and, as such, lacked standing to advance the interest of one set of beneficiaries of the Baldwin Trust over a competing set of beneficiaries. On September 9, 1994, the trial court entered a final order dismissing, for lack of jurisdiction, petitioner's claim for recovery of attorneys fees the respondents spent for their own attorneys out of the Baldwin

Trust funds. The court of appeals reversed that trial court decision, holding that respondents and the affected assets of the Baldwin Trust were both subject to the jurisdiction of the Oregon Court, and remanded the matter to the trial court for further proceedings. *In the Matter of the Estate of Pats Splane, Wesley v. Society National Bank, et. al.,* 143 Or App 1, 922 P2d 1260, 1262-63 (1996).

After remand, the trial court exercised its personal jurisdiction over the respondents. The case proceeded with amended petitions, discovery, an abbreviated accounting hearing on a court-ordered limited post-October 1992 accounting, and ultimately a non-jury trial on the merits of petitioner's pleaded claims for affirmative relief and a full and accurate accounting back to the inception of the Baldwin Trust in 1919. The issues were framed in the Petitioner's Second Amended Request for Relief, filed December 20, 2002, and Respondents' Answer to Petitioner's Second Amended Request for Relief, filed January 3, 2003. The parties include Roger C. Wesley (Wesley), personal representative for Pats Splane's Estate and respondent trustee Society National Bank of Ohio (Society), and its successor in interest KeyBank of Ohio (Key).

Initial Creation of the Mary Baldwin Trust

Beginning in 1914, Mary Baldwin placed certain real estate of her father's (Dudley Baldwin) estate for safekeeping with the Cleveland Trust Company (hereinafter "Cleveland"), predecessor of Society and KeyBank). Ex. 13; Tr. 835-36. In

November 1919, Cleveland entered into a trust agreement with Mary Baldwin that named, *inter alia*, Gouverneur Morris and his daughters Katherine Morris and Patsy Morris (Pats Splane) as successor beneficiaries. Ex. 48. Both Katherine and Pats were given powers of appointment. As noted above, the court of appeals held earlier that Pats subsequently validly exercised her power of appointment in favor of her nieces, Kathleen Wesley and Suzanne Coe.

By its terms, the Baldwin Trust provided for inclusion of Mary's one third share of her father's estate and specifically listed the included assets in Appendix A attached to the trust. Ex. 48. The trust provided for quarterly reports from the trustee to Mary during her lifetime, and gave the trustee power to invade principal to provide for the beneficiaries' support and maintenance (without setting any percentage entitlements), and retain attorneys. Based on Mary's last amendment of the trust in 1922, Gouverneur and his daughters were assigned a 40 percent interest in the trust; while Gouverneur's sister Henrietta Morris was granted a 60 percent interest. Ex. 48.

Mary Baldwin died in 1922. The property then received by Cleveland through Mary's will was impressed with a trust for the benefit of Gouverneur and his daughters, and is documented in a July 13, 1923 appraisal of Mary's property covered by her will. Ex. 44.

Before Mary's death in 1922, she did nothing tangible to vest her trust with assignments or deeds of trust assets to the Trust. Title records introduced by petitioner and his title expert (David Kaprosy) uncovered no documented assignments of listed trust assets to the Trust before Mary's death. Exs. 11-25; Tr. 835-882. In Mary's will however, she assigned all of her property to the Cleveland Trust Company without the words "in trust." Ex. 30. Cleveland later recorded a title certificate certifying all of the real estate received from Mary back in 1914 and in her estate to be devised to her named executor in the will, Cleveland, without the words "in trust" Ex. 27, Tr 868-870, 883-884.

Mary's share of her father's estate property that was placed in trust with Cleveland through her will (Ex. 44) was appraised at $603,154, of which $225,998 (approximately 37.4 percent) was the interest of Gouverneur and his daughters Katherine and Patsy. After imposed taxes of $14,865 were paid, the net share of Gouverneur and his daughters was reduced to $211,133. Ex.44.

Based on the terms of the Baldwin Trust, Pats Splane was entitled to ½ of Gouverneur's 40 percent share of the Trust funds upon his death in 1953. Exs. 30 and 48. On Gouverneur's death in 1953, Pats' ½ share (or 20 percent of the Trust funds) was divided into two equal shares, known as B-1 and B-1A. Tr. 1291-92. The split (according to the testimony of respondents' Joyce Shinn) was designed to accommodate distributions during her lifetime for purchase of a home. Tr. 293, 1330-31. Unlike the

situation with Gouverneur Morris, there were no other named downstream beneficiaries in the Trust to protect; so that distributions of principal up to 50 percent would not have exceeded the Trust's limited provision for invasion of principal for support and maintenance. Ex. 48.

The Baldwin Trust as a Testamentary Trust

In the record, but not addressed by the lower court in its opinion and judgment, is an array of undisputed facts that point to the Baldwin Trust's being a constructive or resulting trust effectuated through Mary Baldwin's will and fully subject to historical accounting requirements in both Ohio and Oregon for testamentary trusts. Although Joyce Shinn (the respondent trust officer responsible for administering Pats Splane's beneficial interest in the Baldwin Trust since about 1983, Tr 1267) characterized the trust as an inter vivos trust instrument, she could claim no legal training that would enable her to discern the differences between an inter vivos trust and testamentary trust. Tr 1283-1286.

(a) The real estate properties recited in Schedule A of the Trust were previously conveyed to respondents in deed form in 1914, sans any reference in the deed to it being in trust. Ex. 13.

(b) Respondents joined with Mary and her sisters in selling some of the deeded property in 1918, acts inconsistent with any prior conveyance in trust of the property deeded. Ex. 14.

(c) Mary's 1922 will recites the devising of all of her property (in the residuary clause of the will) to respondents without any trust qualification. Ex. 30.

(d) There is no documentation or other evidence of any deeds or other property of Mary's being conveyed to respondents in trust during her lifetime.

(e) There is no documentation or other evidence that any of the trust beneficiaries acquired vested interests in any of the property identified in the Mary Baldwin Trust during Mary's lifetime.

(f) Respondents filed certificates of title of the covered real estate in the Baldwin Trust with the recorder of records as Mary's executor, and not as her trustee. Ex. 27.

(g) Together, these pre and post-death actions reflect no funding or vesting of the Baldwin Trust assets during Mary's lifetime. As a result of this failure, the trust property passed to the named beneficiaries in the Trust through testamentary disposition, not by *inter vivos* vesting.

(h) Nothing in the Baldwin Trust authorizes 50 per cent discretionary distributions of principal. Ex. 48. Ms. Shinn's testimony to the contrary is mistaken. Tr. 1286.

Accounting for Baldwin Trust - 1922 to 1974

Nothing is known of the respondents' disposition of the stocks and bonds and other assets listed in the Schedule A of the Baldwin Trust. Both Ed Seifried, a fiduciary expert with over 25 years of specialization as a regulator of the trust industry with the U.S. Comptroller of the Currency (OCC), and respondents' vice president and in-house counsel, Michael Thacker, agreed that respondents could not provide any adequate accounting of the Baldwin Trust funds before 1974. *See* Exs. 2 and 3; Tr. 755-764, 1195-1196.

Mr. Seifried received boxes from respondents in no particular order and ultimately "found too many holes in the records" to do a pre-1974 accounting. Tr 755, 816-821. Not only did he not have pre-1953 records to examine, but he had no asset ledgers for the 1953-1972 period "to determine where the income came from." Tr 757. Mr. Seifried testified that he found particularly troubling sparse records and a large gap (1972-1974), which he characterized as a "blown conversion" (viz., from machine posting transactions to computer-driven controls). Mr. Seifried expressed his opinion that the accuracy of the conversion from machine to computer record systems in 1974 by respondents could not be verified by the records supplied by respondents. Tr. 757. He noted a complete gap in records during this critical time from 1972 to 1974. Tr. 755-64.

Michael Thacker corroborated Mr. Seifried. He acknowledged that it was an "unusual

records, Tr 1993, and he confirmed that to retrieve all of the records "would be impossible." Tr 1195. Asked if respondents could account, Mr. Thacker explained "If we were ordered to do a complete and full accounting back to 1919, with respect to this trust, it would be impossible." Tr 1196. Ms. Shinn, in turn, claimed respondents kept parallel books during the 1972-1974 period where there is a gap in respondents' records. Tr 1267. But she acknowledged she had not seen respondents' 1972-1974 trust records and cannot tell if parallel books can be reconciled. Tr. 1404-1405. Respondents provided no documentation to cure this 1972-1974 records gap or other records deficiencies preceding 1972, and respondents' records for this period must be presumed to be "lost, misplaced, and not available," as Leslie Douglas (a senior vice president and portfolio manager for respondents, Tr. 1177) confirmed. Tr. 1446.

Mr. Seifried further testified (uncontraverted by respondents) that he had never before observed or heard of a situation where, as here, a trust institution could not and would not account for its performance. Tr. 769-71. He testified that trust institutions must be able to account for their handling of all client funds, and characterized respondents' performance as "unique" in his experience and that it "reflected badly on the entire industry." Tr. 994. Mr. Seifried also testified that national banks are subject to federal regulatory recordkeeping requirements, which are not reconcilable with less demanding state requirements. Tr. 739-742, 746. Although Mr.

Seifried's testimony is uncontradicted, it is not mentioned in the trial court's opinion letter.

Missing real estate assets

Because respondents were not required by the trial court to account or provide discovery prior to 1953, petitioner initiated a search of his own for real estate title records covering Baldwin Trust realty that was sold by the Cleveland Trust Company between 1922 and 1953. David Kaprosy (petitioner's title expert from Ohio) identified numerous real estate parcels conveyed by Mary Baldwin to Cleveland in 1914, five years before she created her trust. Ex. 13. Both the deed records in evidence, Ex. 11-25, and Ms. Shinn's testimony, Tr. 1303, confirm there are no account records showing that this realty ever was vested to the trust, or included in the trust assets listed in Appendix A of the trust. As a result, the whereabouts of the real estate sale proceeds from sale of Mary Baldwin's property remains unexplained and unaccounted for by respondents.

All of the records of real property owned by Mary Baldwin through her father's estate and sold before 1922 (while she was alive) disclose that both Mary as an individual and Cleveland, but not as trustee, executed deeds of conveyance covering the property. *See* Exs. 14, 15 and 16. Also, after Mary Baldwin's death in 1922, Cleveland executed all deeds by noting that it was "trustee" for Henrietta Morris's 1/3 interest, but was acting not in trust for the sale of Anna Shultz's (Mary's second sister) and Mary Baldwin's 2/3 interest. *See* Exs. 17 through

25. Three other deed sales, Exs. 26, 27 and 28, disclose that while Cleveland identified itself on the probate records as trustee for Henrietta Baldwin Morris, it did not hold itself out as trustee for Anna Schultz or Mary Baldwin.

Petitioner showed by outside deed records, Exhibits 13 through 28, that one parcel of real estate was owned wholly, and the rest were owned in a 1/3 share by Mary E. Baldwin. Respondents produced neither testimony nor account records to show that the sale proceeds were credited to any account (Baldwin Trust or otherwise). Since there is no evidence that any of the sold real estate was ever deeded to and invested in the Baldwin Trust, it is not clear whether any of the real estate was counted in the 1923 estate appraisal for tax purposes.

Missing non-real estate assets

Without an accounting from respondents, petitioner had no practical way to track the performance of the Baldwin Trust's stocks, bond and other non-realty assets. The portfolio of assets identified in Attachment A of the Trust does appear to be a high quality one and one likely to keep pace with the industrial average of the New York Stock Exchange which increased from about 100 in 1923 to 291 in 1953 according to admitted New York Times news accounts. Tr. 1014-15, 1129; Ex. 45. It is not clear how much weight the trial court attached to these tracking figures, if any.

Based on the documented appraisal of Mary Baldwin's share of her father's estate in 1923, the value of Gouverneur Morris' 40% share of the assets placed into trust with the respondents after taxes was $211,133. Ex. 44, and discussion above at page 10-11. However, in 1954 the respondents reported that the value of these same assets was only $178,753.20. This is shown by Ex. 8 which states that Pats Splane's B-1 account and Katherine Morris' B-2 account (the total of which were derived from the Gouverneur Morris 40% share of the Baldwin estate) were each worth $89,376.60, the total of which is $178,753.20. Ex. 8. Thus the $211,133 had shrunk from 1923 to 1954 by $32,380, during which time the stock market had increased 291%. Pats Splane's one half portion of this loss, as of 1954, would thus be $16,190.

Absent data from respondents about the performance of these non-real estate assets in the Trust, petitioner couldn't gauge the performance of these assets by simply using the industrial average for the 30-year period. Based on the performance of the Dow Jones industrial average between 1922 and 1953 (from around 100 to 291, Tr. 1030-31, Ex. 45), petitioner used an imputed 6 percent a year compounded return. Tr. 1122-1135.

Asked to explain this shortfall between the appraised value of Mary's estate in 1923 and respondents' furnished balance sheet summary in 1953, respondents' Ms. Shinn initially tried to attribute the shortfall to distributions to Gouveneur Morris. Tr 1380. Ms. Shinn claimed to have seen

documentation of pre-1953 distributions to Gouveneur Morris (at least 10 principal invasions totaling more than $10,000.00). Tr 1380. When pressed, though, she couldn't reconcile her earlier disclaimers of any knowledge of principal withdrawals by Gouveneur Morris, Tr 1370, and admitted she couldn't swear to any quantified amounts or numbers of invasions. Tr 1381.

By order of the lower court in 2002, respondents provided a very limited accounting to respondent of their administration of the Baldwin Trust funds from the date of October 1992 until March 2002. This accounting did not include a full historical accounting and was challenged by petitioner on multiple grounds but upheld, nonetheless, by the lower court for the very limited purpose of containing internally consistent figures for the accounting period examined.

Lower Court Ruling and Judgment

The lower court issued its memorandum opinion on July 21, 2004, (see Appendix D, at App.10), finding (a) that respondent acted reasonably in incurring attorneys fees, up to a point, (b) that petitioner failed to show respondent either misappropriated funds or otherwise defrauded decedent or her predecessors in interest, or that respondents failed to submit the quarterly reports required by the trust agreement (the Baldwin Trust) to the respective beneficiaries, (c) that beneficiaries were permitted from time to time to make withdrawals from the principal of the trust estate,

and that the proceeds of the sale of real property was allocated among the various trusts that had an interest in such real property, (d) that respondents' recap of the evidence was accepted over petitioner's, which the trial court found was based wholly on speculation and conjecture, (e) that respondents complied to the best of their ability to the court's order of discovery by respondents from only 1953 until Pats Splane's death, (f) that petitioner, not respondents, bore the burden of proof of providing material evidence that respondents had misappropriated funds or engaged in misfeasance in the administration of the Baldwin Trust, and for this reason petitioner was not entitled to a full accounting from 1919 until October 1992, (g) that statutes of limitation and laches likely barred any recovery under either the laws of Oregon and Ohio, absent a showing of fraud or malfeasance, and (h) that neither party was entitled to an award of costs and attorneys fees *See* appendix D at App.10.

In pertinent part, the lower court determined in its opinion letter, that "the petitioner, by their own initiative, found evidence of real estate transactions back some 60 to 70 years," and "the respondent has complied, to the best of their reasonable ability, with this Court's discovery order." *See* Opinion Letter, July 21, 2004 in appendix D at App.10. Based on these findings, the lower court determined that "the petitioner has failed to provide any material evidence that the respondents have misappropriated funds or engaged in malfeasance in the administration of the Baldwin Trust. Without some showing of fraud or malfeasance, and in light of the fact that the best

evidence that I have is that beneficiaries received quarterly statements from the respondent, I am not inclined to order the extraordinary relief requested by petitioner, specifically, a full accounting from October 19 until October 2002." *See id.*

On September 1, 2004, the lower court entered a general judgment awarding $16,098.85 plus interest to petitioner for attorneys fees incurred by respondents subsequent to December 6, 1993, and paid from the Baldwin Trust, and denying the balance of petitioner's claims for affirmative relief and an accounting from 1919, based on petitioner's failure to meet his burden of proof and the absence of any evidence of misappropriated funds of the Baldwin Trust *See* General Judgment in appendix C at App.5.

REASONS FOR GRANTING THE WRIT

I. The decision below raises an important preemption question of whether a national bank trustee bears the burden of proof as a fiduciary governed both by the National Bank Act and common law trust accounting principles extant in Oregon and Ohio to account to an Oregon beneficiary under an Ohio trust for identified missing trust assets.

It is uncontroverted that the bank trustee in this case could not account for identified missing Baldwin trust assets. Both petitioner's trust expert (Ed Seifried,) and respondents' vice president

(Michael Thacker) agreed that respondents could not provide any adequate accounting of the Baldwin Trust funds before 1974. *See* Exs. 2 and 3; Tr. 755-764, 1195-1196.

This case affords this Court the opportunity to appraise the preemptive reach of the National Bank Act (12 U.S.C. §92a), and its implementing regulation governing the administration of member bank trust operations, over the administration of fiducial accounting practices in state courts that seriously depart from established norms of historical accounting requirements imposed on national bank trustees. To the best of our knowledge, this Court has never addressed the applicability of the National Bank Act and the OCC's implementing trust regulations governing the trust operations of national banks.

This case then is one of first impression. Petitioner raised this federal question issue over the applicability of 12 C.F. R. 9.8 in the trial court and addressed the potential preemptive reach of federal law as an alternative theory of the case in the appellate proceedings below. For reasons we still do not fully comprehend, the appellate courts of Oregon declined to address the important accounting issues raised in this case. We necessarily look to this Court for relief.

Central to the administration of trusts is the fiducial duty placed on trustees to account to their beneficiaries. The *Restatement (2d) of Trusts*, §172 (1959) places the duty to keep records and account to

the beneficiaries squarely in the hands of trustees. *See* appendix I. *Scott on Trusts* elaborates on this fundamental trustee duty as follows: "His accounts should show what he has received and what losses have been incurred." *See* II *A. Scott on Trusts*, § 172, at 452 (4th ed. 1987).

Respondents argued that the duty to account was both based on statute and limited by the terms of the Mary Baldwin trust instrument. Respondents argued that the trust instrument limits respondents' accounting duties to providing quarterly reports, which they claim they should be presumed to have provided, and the trial court agreed. Opinion Letter, July 21, 2004, pages 2-3; ER-27-28. While quarterly reports were required to be made to Mary during her lifetime, the trust agreement is silent as to what is required of the trustee after her death. Also, there is nothing in the trust agreement which suggests that the quarterly reports required therein were intended to replace or supplant the basic duty to account required of all fiduciaries. Considering this long-standing duty imposed on trustees to account fully and accurately, the trust language should rightfully be read narrowly to accord with established accounting duties imposed on trustees generally, and the trial court erred in not so doing.

A. The Baldwin Trust is governed by principles applying to testamentary trusts, and not those that govern *inter vivos* trusts

Whatever the merits of a narrow reading of the Trust instrument that limits respondents' accounting duties, such a construction presumes a fully funded and vested *inter vivos* trust. The proofs are otherwise, however, and were never addressed by the lower courts. Under the probative facts of this case, respondents' duty to account is governed by accounting requirements for testamentary trusts, not *inter vivos* trusts as Ms. Shinn assumed in her testimony, Tr. 1285, and respondents urged in their arguments. Because the trial court, in its decision, appears to assume the Baldwin Trust is an *inter vivos* trust, petitioner cannot be certain the trial court discerned the testamentary nature of the Baldwin Trust or the heightened accounting requirements recognized for testamentary trusts generally and specifically in Ohio's statutes.

Both the treatise writers and case authorities in Ohio and elsewhere confirm that for an *inter vivos* trust to be recognized, as such, it must satisfy two requirements: clear manifestation of the settler's intent through an express trust agreement and, just as importantly, funding during the settler's lifetime. *Cf. Hill v. Irons,* 92 Ohio App 141, 109 NE2d 699, 703 (1952) and *Homer v. Wallenweber,* 89 Ohio App. 255, 101 NE2d 229, 232-33 (1951). Even respondents' principal witness, Joyce Shinn, acknowledged the obligation of respondents to render accountings for testamentary trusts. Tr. 1285.

Failure to fund an expressly created trust during the settler's lifetime invalidates the trust as an *inter vivos* trust, but doesn't prevent its being

created as a testamentary trust through the will. This principle is reaffirmed as a part of Ohio's organic trust law in a 1938 decision by the Ohio Supreme Court: *Cleveland Trust Co, v. White, et al.*, 134 Ohio St. 1, 15 NE2d 627, 629 (1938). Petitioner argued to the trial court that this case was controlling, but to no apparent avail. The *Cleveland Trust* case was not mentioned by respondents in any of their briefs to the trial court, and the trial court adopted much of the respondents' arguments wholesale. *See* Opinion Letter, July 21, 2004, page 2; ER-27. Thus the trial court erred by not applying the critical requirements to vest an *inter vivos* trust, and by not holding that the trust was testamentary, and not *inter vivos*.

Cleveland Trust recites the recognized principle in Ohio and most jurisdictions that if a settler sets up a trust in his or her lifetime under a trust agreement and transfers or delivers his or her property to the trustee contemporaneously with the intention of passing title, and the beneficiaries take immediate vested interests in such property, the trust is perfected, notwithstanding any reservation of rights and powers (such as the right to amend the agreement) by the settlers to the trust estate. *Cleveland Trust* holds that if all of the requirements for completing an *inter vivos* trust are satisfied (expressed intent coupled with funding during the lifetime of the settler), an *inter vivos* trust is vested and the arrangement is not perforce of a testamentary nature. 134 Ohio St at 7-8.

Because the evidence is uncontradicted that the Baldwin Trust was not funded until after Mary's death, and then by operation of her will, the trust cannot be an *inter vivos* trust, and the stricter accounting requirements for testamentary trusts should have been applied by the trial court. Respondents certainly make no suggestion that any of the real estate deeded to Cleveland in 1914, and subject to Mary's will, should be treated as a personal gift to them. Tr. 871-872.

In the trust at issue in *Cleveland Trust* case, all of the deeds, stock certificates and bonds representing the property earmarked for trust were manifestly placed in the bank as trustee (not for some other purpose) and gave to the named beneficiaries immediate vested interests. These combined acts created a perfected *inter vivos* trust in the view of the *Cleveland Trust* court. However, this was not the situation in the instant case.

Cleveland Trust was careful to note, though, that where the settler retains powers which in their cumulative effect amount to ownership of the "trust" assets during his or her lifetime, with such control over the administrative functions of the trustee so as to render the trustee's actions in behalf of the settler merely those of a settler's representative, no trust is established.

Mary Baldwin's trust stands in marked contrast to the trust involved in the *Cleveland Trust* case. For in Mary's trust, the real estate properties recited in Schedule A of the Trust were previously

conveyed to respondents in deed form in 1914, sans any trust reference, while the stocks and bonds and other assets recited in Schedule A were not transferred at all during Mary's lifetime in any manifest way.

Not only was there no evidence of any deeds, or other property of Mary's conveyed to respondents in trust during her lifetime, there was no evidence that any of the trust beneficiaries acquired vested interests in any of the property identified in the Mary Baldwin Trust during Mary's lifetime. And, while Mary's will recites the devising of all of her property (in the residuary clause of the will) to respondents without qualification, respondents implicitly acknowledged the testamentary nature of the devise when Cleveland subsequently filed certificates of title of the covered real estate in the Baldwin Trust with the recorder of records as Mary's executor, and not as her trustee.

As such, Mary's assets became impressed with a resulting or constructive trust through Mary's will that incorporated the provisions of her previously executed 1919 trust instrument, and ensuing amendments, but by testamentary disposition, and not by a vested *inter vivos* trust. Where there is an unperfected *inter vivos* trust, California's and Oregon's courts join Ohio's in holding that where an attempted express trust was unenforceable (as here), the trustee cannot simply keep the property, and would be declared a resulting or constructive trustee. *See In re Gaines' Estate,* 15

Cal 2d 255, 100 P2d 1055, 1061 (1940); *Toney v. Toney,* 84 Or 310, 165 P 221 (1914).

B. Respondents had the Burden of Proof to Account for and Explain any Misappropriated or Missing Baldwin Trust Funds in their Custody and Control

Petitioner clearly established by the weight of the evidence that Mary Baldwin placed the realty covered in Attachment A of the Baldwin Trust in respondents' custody and control and the other assets listed in the Trust Attachment as well, even though they didn't meet the requirements for a vested *inter vivos* trust. The trial court doesn't appear to dispute this in its decision. In declining, however, to sustain petitioner's showing of unaccounted for stocks, bonds, realty proceeds and other assets impressed in Mary's trust, the trial court placed the burden of proof squarely on petitioner to prove respondents misappropriated or otherwise defrauded decedent and the other beneficiaries. In placing the burden of proof on petitioner instead of respondents, the trial court clearly erred.

Historically, the common law has placed on fiduciaries the burden of showing their faithfulness to their trust in an action for an accounting. *See* Annot., *Availability of Equitable Remedy of Accounting Between Principal and Agent,* 3 A.L.R. 2d 1310, 1312 (1949) (citing Pomeroy, *Equity Jurisprudence* (5th ed.). Trustees become obligated to render full and accurate historical accountings the

moment a settler entrusts his or her property to the recipient in a fiduciary relationship. To be sure, Ohio courts require trustees to account without regard to the nature of the trust (*i.e.*, *inter vivos* or testamentary). *See Nozik v. McDonald,* 99 Ohio App 3d 353, 650 NE 2d 923, 926 (1994); *Cleveland trust Co. v. White, et al.,*. 134 Ohio St. 1, 15 NE 2d 627 (1938). And we continue to believe that a trustee's duty to provide historical accountings is not dependent upon establishing a testamentary trust under accounting standards embraced by the *Restatement (2d) of Trusts, supra.*

Once the fiduciary relationship is established, the burden then shifts to the fiduciary to show that he has performed his duties properly. According to ancient, but still valid precedent: "the action for account render compels the fiduciary to explain the books under oath." *See Townes v. Brichett,* 39 Va. 173, 12 Leigh 173 (1841). Under this bedrock principle of fiduciary law, the fiduciary could not escape liability by either remaining silent or (as here), disclaiming any wrong doing and trying to impose the burden on the beneficiary to prove it misappropriated unaccounted-for assets.

Other state precedents require the fiduciary to show when, to whom and for what purposes the payments were made, so that the beneficiaries could make a reasonable test of the accuracy and completeness of the accounts. Failure to provide full and accurate historical accountings when requested by the beneficiary imposes all presumptions and assigns all obscurities and doubts <u>against</u> the

trustee. *Cf. Alexopoulos v. Dakouras,* 48 Wis 2d 32, 179 NW2d 836 (1970); *Updike v. Wolf and Co.,* 175 Ill App 3d 408, 529 NE2d 993, 999-1000 (Ill. App. 1988); *Engelsmann v. Holekamp,* 402 SW2d 382 (Mo. 1966).

This burden that the common law places on the fiduciary to account for assets shown to have come into his or her custody and control is a settled imperative: "If the trustee fails to keep proper accounts, all doubts will be resolved against him and not in his favor." *See A. Scott on Trusts,* § 172, *supra* (quoting *Restatement (2d) of Trusts, supra). See* appendix G, at 45. *Accord, Jimenez v. Lee,* 274 Or 457, 547 P2d 126, 130 (1976); *Wood v. Honeyman,* 178 Or 484, 169 P2d 131, 162-63 (1946). *See Gorger v. Gorger,* 276 Or 267, 555 P2d 1, 15 (1976).

The reasons for imposing this burden on trustees are clear: because "the trustee alone is in a position to know all the facts concerning the administration of the trust, and obviously he cannot be permitted to gain any possible advantage from his failure to keep proper records." II *A. Scott on Trusts,* § 172, *supra,* at 456. However, that is exactly what happened here, and what the trial court allowed to go uncorrected.

What trustee accountability means when a trust relationship is established is that the burden of proof then shifts to the fiduciary to render an accounting. This principle of burden shifting is established in California law and has been more recently affirmed in a series of cases arising in California state and federal jurisdictions over

unaccounted-for funds placed with fiduciaries. In *Otto v. Niles,* 106 F3d 1456, 1460-62 (9th Cir. 1997), the Ninth Circuit traced the common law history of burden imposition on fiduciaries to account for assets in their custody, and affirmed the established principle in California and other jurisdictions around the country that trustees and other fiduciaries bear the burden of accounting for assets taken into their possession, citing a long line of cases imposing the burden of proof on the fiduciary.

For example, in *Batson v. Strehlow,* 68 Cal 2d 662, 68 Cal Rptr 589, 598, 441 P2d 101 (1968) (cited in *Niles),* the California Supreme Court affirmed the agent's duty to his principal as similar to a trustee's duty to a beneficiary. In both instances, the fiduciary owes a full disclosure of all the facts relating to the acts under oath. So that when the principal "questions the acts done by the agent in the course of the agency the burden is cast upon the latter to prove that he acted with the utmost good faith toward the principal and that prior to the transaction he made a full disclosure of all the facts relating to the acts under attack." *Accord, Vista Oil Co. v. Drum,* 184 Cal 226, 193 P 243, 247-48 (1920) (once beneficiary relationship is established, the burden rested on the fiduciary to show full disclosure of the transaction).

Similarly, in *Kennard v. Glick,* 183 Cal App 2d 246, 7 Cal Rptr 88, 91 (1960), a California appellate court held that "In an action for an accounting the agent (like a trustee) has the burden of proving that he paid to the principal or otherwise

properly disposed of the money or other thing which he is proved to have received for the principal." *Accord*, *Gorger v. Gorger, supra* (citing *Wood v. Honeyman, supra).*

Therefore, basic principles of fiduciary law place the burden to account on the fiduciary once the principal has shown (as here) that funds or assets have been entrusted to the fiduciary and not paid over or otherwise accounted for. Placing the burden of proof to account on the trustee fiduciary (as opposed to the beneficiary or principal) is also grounded in sound policy reasons. Access to the funds and how they were received and disposed of are likely to be more accessible to the trustee fiduciary than to the beneficiary or principal. *See Otto v. Niles, supra,* at 1462.

By shifting the burden of proof to Pats Splane and her personal representative, the trial court, and the appellate courts of Oregon who endorsed the trial court's decision, placed petitioner in an untenable position of having to prove malfeasance for which he had not been provided records or explanations from respondents regarding identified missing funds, and thus was in no position to find out what happened to the trust assets in respondents' custody and control at times relevant.

As national banks chartered under the National Bank Act (12 U.S.C. §92a) respondents are subject to preemptive reach over the trust operations of member banks, where the state standards are found to be either non-existent or incompatible with

safety and soundness principles. Regulatory authority for controlling the trust operations of national banks like respondents derives from 12 U.S.C. §92a. *See* appendix E at App.18. Pertinent sections of the implementing OCC regulation can be found in 12 C.F.R. 9. *See* appendix F, G and H at App.19, App.20 and App.21. This regulation was originally enacted in 1963, following the assumption of trust operation regulatory control by the Office of the Controller of the Currency (OCC).

Previously, national bank trust operations were regulated by the Federal Reserve under the Fed's Regulation F. While 12 C.F.R. 9.8 applies state law of the state in which the national bank acts in a fiduciary capacity (apparently Ohio for regulatory purposes), the regulation affirmatively requires member banks to retain their trust records for at least three years from "the later of the termination of the account (trust) or the termination of any litigation relating to the account." See 12 C.F.R. 9.8. In turn, 12 C.F.R. 9.9 requires an arrangement of a suitable audit of all significant fiduciary activities under the direction of the trust department's audit committee. *See* appendix G at App.20. And 12 C.F.R. 9.18 requires national banks administering collective investment funds (as here) to issue a financial report at least once annually and provide a copy of the report to all persons entitled to see the report. *See* appendix H at App.21.

From a broader historical perspective, state laws that contravene or impair the preemptive power of federal laws to control the operations of national

banks have historically been required to give way to any contrary federal policy underlying the NBA. See Franklin Nat'l Bank v. New York, 347 U.S. 373, 378-79 (1954); see also *Marquette Nat'l Bank v. First Omaha Srv. Corp.*, 439 U.S. 299, 308, 314-15 (1978) ("Close examination of the National Bank Act of 1864, its legislative history and its historical context makes clear that Congress intended a national banking system."). In fine-tuning its preemptive jurisprudence to better deal with the efficient exercise of the banking powers of national banks, the Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32-34 (1996) emphasized the preemptive reach of the NBA. Properly construed, the NBA disregards all state laws that impair the safety and efficiency of national banks subject to federally authorized visitorial powers.

It is perfectly clear in this case that respondents did not retain their old records adequately enough to enable them to provide an historical accounting of the Baldwin Trust. This they freely acknowledge. As a national bank required to retain trust records they could not maintain two tracks of records: one in compliance with their current banking operations and another that encompasses the faulty or non-existent trust records of state bank trust operations they purchased or acquired. Such a two-tiered system would be incompatible with the safety and soundness principles the OCC intended by requiring the maintenance of trust records after the trust and/or litigation has been completed.

Respondents have never argued that they were not responsible for the acts of their predecessor trust institutions, and there is no relevant state or federal laws that insulate a successor bank trustee from the acts of its predecessors. While some of the judges wondered at oral argument before the court of appeals whether this might be the case, this issue have never been raised, and has no basis. The parties agreed at trial that Cleveland Trust was either bought or taken over by Ameritrust, and then Society National Bank, who, in turn, was absorbed by KeyBank..

At base, respondents' failure to keep trust records sufficient to enable them to render a full historical accounting represents a clear breach of not only their fundamental fiducial responsibilities long recognized in the case and treatise authorities, but their very clear and specific violation of their record keeping responsibilities as a national bank. Petitioner seeks a full and adequate historical accounting from respondents in this case, which we believe is vitally necessary to enable petitioner to meet his own fiducial obligations in the administration and proper closing of Pats Splane's estate.

CONCLUSION

For the reasons and authorities set forth above, the petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully Submitted,

Roger C. Wesley Personal Representative
11210 Chapel Road
Fairfax Station, VA
22039
(703) 503-3116

Clayton C. Patrick
79988 Stewart Creek Road Clatskanie, OR
97016 (503) 728-3400

Counsel of Record

APPENDIX

APP. A

IN THE SUPREME COURT OF THE STATE OF OREGON

In the matter of the Will of Pats Splane, Deceased,
Appellant, Petitioner on Review

ROGER C. WESLEY, personal representative of the Estate of Pats Splane,
Appellant, Petitioner on Review,

v.

SOCIETY NATIONAL BANK, and its successors in interest,
Key Trust Company of Ohio, N.A. and Key Bank National
Association, Cleveland, Ohio, Charter No. 14761
Respondents, Respondents on Review

Court of Appeals
A12602

S0555767

ORDER DENYING REVIEW

Upon consideration by the court,

The court has considered the petition for review and orders that it be denied.

May 7, 2008 /s/ G. Michael Gillette, Presiding justice

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c: Clayton C. Patrick
Frank C. rote, III

APP. B

FILED: November 28, 2007

IN THE COURT OF APPEALS OF THE STATE OF OREGON
In the Matter of the Will and Estate of Pats Splane, Deceased.

ROGER C. WESLEY, personal representative of the Estate of Pats Splane,
Appellant, Petitioner on Review,

v.

SOCIETY NATIONAL BANK, and its successors in interest,
Key Trust Company of Ohio, N.A. and Key Bank National
Association, Cleveland, Ohio, Charter No. 14761
Respondents, Respondents on Review

Josephine County Circuit Court
93P0035

A126002

Allan H. Coon, Judge

Argued and submitted: November 9, 2007

Before Edmonds, Presiding Judge, and Wollheim and Sercombe, Judges

Attorney for Appellant: Clayton C. Patrick

Attorney for Respondents: Frank C. Rote

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing Party: Respondents

[ ] No costs allowed
[x] Costs allowed, payable by: Appellant

APP. C

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF JOSEPHINE

In the Matter of the Will and Estate of PATS SPLANE, deceased	)
ROGER C. WESLEY, Personal Repre-	)
CASE NO. 93-P0035	)
sentative of the Estate of PATS SPLANE,	)
GENERAL JUDGMENT	
Petitioner,	)
v.	)
SOCIETY NATIONAL BANK and its successors in interest, Key Trust Company of Ohio, N.A. and Key Bank National Association, Cleveland, Ohio, Charter No. 14761,	)
Respondents	)

Petitioner's Roger C. Wesley's Second Amended Request for Relief came on for trial on the merits on June 15, 2004; Petitioner personally appeared and appeared by his attorney, Kim L. Jordan; Respondents appeared by Michael Thacker, one of its officers and appeared by Frank C. Rote, III,

its attorney; testimony and exhibits on behalf of the parties were received in evidence and the court considered the closing arguments on behalf of the parties, the court having issued its opinion letters of July 21, 2004, and August 19, 2004, copies of which are attached hereto and made a part hereof; the court finds as follows:

First Claim for Relief – Petitioner is awarded judgment against Respondents in the amount of $16,098.85 that being the attorney fees incurred by Respondents in this matter subsequent to December 6, 1993, and paid from the Baldwin trust together with interest at the statutory rate from the date paid to Respondents' attorneys until paid to Petitioner.

Second Claim for Relief – Petitioner failed to meet his burden of proof; judgment for Respondents.

Third Claim for Relief – Petitioner failed to meet his burden of proof; judgment for Respondents.

Fourth Claim for Relief – Petitioner failed to meet his burden of proof; judgment for Respondents.

Fifth Claim for Relief – Was withdrawn by Petitioner; judgment for Respondents.

Sixth Claim for Relief –The Court found no evidence of misappropriated funds or malfeasance in administration of the Baldwin Trust; no accounting from 1919 is ordered; judgment for Respondents.

Both Petitioner's and Respondents' requests for attorneys fees and costs be and hereby are denied.

Petitioner's remaining objections (2, 5, 6, 7, 8, 9, 10, 12, and 13) to the two accountings by Key Bank National Association dated April 12, 2002, are without merit and such objections are overruled and denied; judgment for Respondents.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Petitioner receive judgment against Respondents in the sum of $16,098.85 together with interest at the statutory rate.

MONEY AWARD

Judgment Creditor	Roger C. Wesley, Personal Representative of the Estate of Pats Splane, deceased
Judgment Creditor's Address	11210 Chapel Road Fairfax Station, VA 22039
Judgment Creditor's SS #	unknown
Judgment Creditor's Driver's License No.	unknown
Judgment Creditor's Attorney	Kim L. Jordan 228 NW B Street Grants Pass, OR 97526 Phone: 541-474-1041

Judgment Debtor	KeyBank National Association
Judgment Debtor's Address	127 Public square 2d Floor Cleveland, OH 44114-1306
Judgment Debtor's Attorney	Frank C. rote, III PO Box 10 Grants Pass, OR 97528 (541) 479-2678

Name of any person or public body, as defined in ORS 174.09, other than the judgment creditors' attorney that is known by the judgment creditor to be entitled to any portion of the money award: None.

Judgment Amount	Judgment in favor of Plaintiff, Roger Wesley in the amount of 416,098.85
Pre-Judgment Simple Interest	$5,028.55 and on $16,098.85 at 9% from 9-8-98 to the date of this judgment
Post-Judgment Simple Interest	At the rate of 9% on $16,098.85 from the date of this judgment until fully paid
Attorneys Fees	None

Costs None

DATED this 30th day of August, 2004

/s/ Allan H. Coon

CIRCUIT COURT JUDGE

APP. D

State of Oregon
Josephine County Circuit Court

August 19, 2004

Mr. Frank C. Rote, III
Attorney at Law
PO Box 10
Grants Pass, OR 97526

Mr. Kim L. Jordan
Attorney at Law
228 NW B Street
Grants Pass, OR 97526

RE: The Estate of pats Splane, Case No. 93P0035

Dear Counsel:

I have received and considered Mr. Jordan's letter of August 16, 2004, as well as Mr. Rote's letter of August 17, 2004. In reviewing my letter opinion of July 21, 2004, as well as my notes, I can see that it

was my intention to order the respondent to reimburse attorney's fees paid by the estate if incurred after Judge O'Neal's decision became final. Unfortunately, I used the date of September 9, 1994, and as Mr. Jordan points out, Judge O'Neal's judgment became final on December 6, 1993. Therefore, I would like the judgment to reflect the correct date of December 6, 1993.

It appears that Mr. Jordan's other concern, regarding the best way to compute pre-judgment interest on attorney's fee payment, has been agreed to by Mr. Rote.

This being said, I would request Mr. Rote to submit a revised general judgment in keeping with this modification.

Very truly yours,

/s/ Allan H. Coon
Circuit Court Judge

State of Oregon
Josephine County Circuit Court

July 21, 2004

Mr. Frank C. Rote, III
Attorney at Law
PO Box 10
Grants Pass, OR 97526

Mr. Kim L. Jordan
Attorney at Law
228 NW B Street
Grants Pass, OR 97526

RE: The Estate of pats Splane, Case No. 93P0035

Dear Counsel:

Following the trial in the above-referenced case, the Court took this matter under advisement and awaited the submission of counsel's closing arguments. The Court received such closing arguments from Mr. Jordan and Mr. Rote, including the reply brief by Mr. Jordan which this Court permitted in order to conform with the Oregon Rules

of Civil Procedure. Mr. Rote will not be permitted a response to Mr. Jordan's reply. I have read the briefs, examined the law and I am now ready to announce my decisions.

Petitioner's Second Amended Request for Relief, filed December 20, 2002, lists six separate claims for relief. I will address each claim for relief as well as each party's request for award of their reasonable attorney's fees.

First, petitioner requests reimbursement of attorney's fees paid to respondent's attorneys in this case. Evidence produced (petitioner's exhibit 5) shows that respondents paid the sum of $22,015.31 from trust funds for attorney's fees in this case. The trust does grant the respondent power to hire attorneys for trust purposes. The Court finds that the respondent did act reasonably in incurring attorney's fees, up to a point. There was a legitimate issue concerning the proper disposition of trust assets. Did the decedent exercise her testamentary appointment, or did she not? Mr. Jordan would argue that the bank should have immediately realized that there was a conflict of interests between their beneficiaries and submitted the assets to the court in the form of an interpleader action. This certainly was one way to handle the case; however, I find that the bank was not unreasonable to take steps to insure the term of the trust were enforced as intended by Mary Baldwin. Once Judge O'Neal ruled on this matter and upon that judgment becoming final, it was unreasonable for the respondent to charge additional fees to the trust. Therefore, it is

my decision that any attorney's fees incurred by the respondent after September 9, 2004, and paid by trust funds, must be reimbursed to the petitioner with interest at the statutory rate. Schedule C of petitioner's exhibit 5 indicates when attorney's fees were paid, but not when they were incurred. Therefore, Mr. Rote's sheets will have to be consulted for a correct reimbursement award on this issue.

Next, petitioner requests interest, at the statutory rate, on $10,177.00, which was due as of December 6, 1993 but not paid until January 18, 2003. Petitioner claims the amount due is $7,400.00. The Court finds that the petitioner has failed to meet their burden of proof as to what amount is due, if any. This relatively small issue was not vigorously litigated. The best evidence that I have, the greater weight of evidence, shows that the amount withheld by the respondent continued to accrue interest at close to the statutory rate; perhaps a little less, perhaps a little more. The bottom line is that the Court cannot tell the amount petitioner was damaged, if any.

Next, the petitioner requests reimbursement for respondent's failure to credit proceeds from the sale of real property of the trust. In addition, the petitioner also claims damages due to the respondent's failure to credit proceeds of sale of stock and other assets of the trust. I choose to address these two claims together in that my decision is the same on both requests, and my reasons are the same in each case. The petitioner has failed to show that respondent either misappropriated funds or otherwise defrauded decedent or her predecessors in

interest. Nor has the petitioner shown any reasonable likelihood that the respondent failed to submit the quarterly reports, required by the trust agreement, to the respective beneficiaries thereby suggesting a potential for malfeasance. What evidence this Court does have supports a contrary conclusion; that the respondent has submitted quarterly reports; that beneficiaries were permitted and did, from time to time, make withdrawals from the principal of the trust estate; and that the proceeds of the sale of real property was allocated among the various trusts that had an interest in such real property. In the respondent 's closing brief, Mr. Rote made a significant recap of the evidence produced in this case, starting on page one and concluding on page seventeen. I am in agreement with Mr. Rote's recitation of the best evidence in this case. The petitioner does challenge the inferences to b drawn from such evidence, but offers no evidence of its own in contravention to the respondent's inferences. Petitioner's case is based wholly on speculation and conjecture.

Next, petitioner requested reimbursement due to the respondent's failure to pay withheld capital gains. The Court notes that the petitioner has withdrawn that claim.

Next, the petitioner requests an accounting for the period from 1919 until October of 1992. That request is denied. Petitioner has testified that they are satisfied, or at least do not contest the respondent's actions from 1974 forward. In light of petitioner's allegations of misappropriation or malfeasance on

respondent's part, this Court ordered discovery by the respondent from 1953 until the death of Pats Splane. The petitioner has, by their own initiative, found evidence of real estate transactions back some 60 or 70 years. I find that the respondent has complied, to the best of their reasonable ability, with this Court's discovery order. In spite of all of this, the petitioner has failed to provide any material evidence that the respondents have misappropriated funds or engaged in malfeasance, and in light of the fact that the best evidence that I have is that beneficiaries received quarterly statements from the respondent, I am not inclined to order the extraordinary relief requested by petitioner, specifically, a full accounting from 1919 until October 1992. Without some showing of fraud or malfeasance, I am confident that the statutes of limitation and doctrine of laches would bar any recovery under either the laws of Oregon or Ohio. Without petitioner's showing some likelihood of fraud or malfeasance, to require the respondent to provide a full accounting back to 1919 constitutes nothing more than a fishing expedition.

Next, the Court notes that each party requests their reasonable attorney's fees and costs in this case. The petitioner relies on ORS 128.155 as authority for their receipt of attorney's fees. The Court will deny the petitioner's request for attorney's fees; it is my finding that the petitioner cannot receive an award of costs or attorney"s fees because the "beneficiary" was not successful in this case. Furthermore, the Court will not award costs or attorneys fees to respondent in that respondent has not pled nor

shown that the beneficiary filed the petition in bad faith or that the petition was frivolous.

Mr. Rote may prepare judgment accordingly.

Very truly yours,
/s/ Allan H. Coon
Circuit Court Judge

APP. E

28 U.S. §92a Trust Powers

a) Authority of Comptroller of the Currency

The Comptroller of the currency shall be authorized and empowered to grant by special permit to national banks applying therefore, when not in contravention of State of local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of assets, assignee, receiver, committee of estates and lunatics, or to any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

APP. F

12 C.F.R. §9.8 Recordkeeping

(a) *Documentation accounts.* A national bank shall adequately document the establishment and termination of each fiduciary account and shall maintain adequate records for all fiduciary accounts.

(b) *Retention of records.* A national bank shall maintain records described in paragraph (a) of this section for a period of three years from the later of the termination of the account or the termination of any litigation relating to the account.

(c) *Separation of records.* A national bank shall ensure that records described in paragraph (a) of this section are separate and distinct from other records of the bank.

APP. G

12 C.F.R. §9.9 Audit of fiduciary activities

(a) *Annual audit.* At least once during each calendar year, a national bank shall arrange for a suitable audit (by internal or external auditors) of all significant fiduciary activities, under the direction of its fiduciary audit committee, unless the bank adopts a continuous audit system in accordance with paragraph (b) of this section. The bank shall note the results of the audit (including significant actions taken as a result of the audit) in the minutes of the board of directors.

(b) *Continuous audit.* In lieu of performing annual audits under paragraph (a) of this section, a national bank may adopt a continuous audit system under which the bank arranges for a discrete audit (by internal or external auditors) of each significant fiduciary activity (*i.e.,* on an activity-by-activity basis), under the direction of its fiduciary audit committee, at an interval commensurate with the nature and risk of that activity. Thus, certain fiduciary activities may receive audits at intervals greater or less than one year, as appropriate. A bank that adopts a continuous audit system shall note the results of all discrete audits performed since the last audit report (including significant actions taken as a result of the audits) in the minutes of the board of directors at least once during each calendar year.

APP. H

12 C.F.R. §9.18 Collective investment funds

(a) *In general.* Where consistent with applicable law, a national bank may invest assets that it holds as fiduciary in the following collective investment funds:

* * * * *

(6) *Audits and financial reports*-(i) *Annual audit.* At least once during each 12-month period, a bank administering a collective investment fund shall arrange for an audit of the collective investment fund by auditors responsible only to the board of directors of the bank.

(ii) *Financial report.* At least once during each 12-month period, a bank administering a collective investment fund shall prepare a financial report of the fund based on the audit required by paragraph (b)(6)(i) of this section. The report must disclose the fund's fees and expenses in a manner consistent with applicable law in the state in which the bank maintains the fund. This report must contain a list of investments in the fund showing the cost and current market value of each investment, and a statement covering the period after the previous report showing the following (organized by type of investment):

* * * * *

APP. I

Restatement (2d), Trusts, §172 (1959).

§172 Duty to Keep and Render Accounts

The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust.

a. Duty to keep accounts.

The trustee is under a duty to keep accounts showing in detail the nature and amount of the trust property and the administration thereof.

b. Effect of failure to keep accounts.

If the trustee fails to keep proper accounts, he is liable for any loss or expense resulting from his failure to keep proper accounts. The burden of proof is upon the trustee to show that he is entitled to the credits he claims, and his failure to keep proper accounts and vouchers may result in his failure to establish the credit he claims.

c. Duty to render accounts.

The beneficiary may by a proper proceeding compel the trustee to render to the proper court an account of the administration of the trust. In many States trustees appointed by the court, or

testamentary trustees, or in some states all trustees, must submit their accounts at designated intervals to the proper court for its approval. The matter of accounting is regulated by statute in many states.

The trustee may be compelled to account not only by a beneficiary presently entitled to the payment of income or principal, but also by a beneficiary who will be or may be entitled to receive income or principal in the future. This is true even though the interest of the beneficiary is contingent. As to the effect of laches of a beneficiary who has an interest enjoyable only in the future, see §219, Comment *e*.